UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MCDERMOTT, et al. Plaintiff(s) v. NATIONSTAR MORTGAGE, LLC, et al. Defendant(s)	Civil Action No. 13-cv-06980

PLAINTIFF'S RESPONSE IN OPPOSITION TO SUMMARY JUDGMENT

I. Introduction

The present case is relatively simple. After acquiring Martin McDermott's (hereinafter "Plaintiff") mortgage, Nationstar Mortgage, LLC (hereinafter "Defendant" or "Nationstar") beset Plaintiff with countless correspondence regarding an alleged default and threatened foreclosure, despite the fact that Plaintiff complied with all requirements imposed by Bank of America, N.A. (hereinafter "BOA") to complete his loan modification. As set forth in his Complaint, Defendant's actions amounted to serial violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq., (hereinafter "FDCPA"). Now, in seeking summary judgment as to Plaintiff's FDCPA claims, Nationstar incredulously asserts two main arguments. First, it claims that it was not a "debt collector," because "it began servicing, and has only serviced, Plaintiff's mortgage loan" after it was no longer in default. And, second, Nationstar claims its initial correspondence was not "in connection with the collection of any debt." Neither argument is supported by the law or, more fundamentally, the facts of this case.

As an initial matter, Nationstar's own corporate designee acknowledged that when Plaintiff's mortgage was acquired by Nationstar, it was in default. As a matter of law, this renders Nationstar a debt collector under the FDCPA. The Third Circuit has repeatedly held as much. See FTC v. Check Investors, Inc., et al., 502 F.3d 159, 173 (3rd Cir. 2007)(explaining that “Congress has unambiguously directed **our focus to the time the debt was acquired** in determining whether one is acting as a creditor or debt collector under the FDCPA. . . .”)(emphasis supplied). With respect to its second claim, at best, there is an open issue as to whether the letter that serves as the basis for Nationstar’s argument was even sent to Plaintiff. At worst (for Nationstar), its own corporate designee indicated that a different letter – the one attached to Plaintiff’s Complaint – was Nationstar’s initial correspondence to Plaintiff and, as set forth below, that letter certainly gives rise to Plaintiff’s FDCPA claim. Accordingly, there is no sound basis for granting Defendant’s request for summary judgment. Indeed, based on the facts of this case, there is little doubt that Nationstar violated the applicable provisions of the FDCPA.[1]

II. Relevant Facts

In November of 2009, Plaintiff purchased a personal home – located at 3804 Dresher Road in Bensalem, Pennsylvania – which he financed, in part, through a mortgage obtained from Harleysville National Bank & Trust Company in the amount of $191,468.00.[2] In or around November of 2009, BOA began servicing Plaintiff’s mortgage.[3] In or about November 2012, Plaintiff informed BOA that, due to personal financial hardship, he was having difficulty making the required monthly payments on his mortgage.[4] By that time, Plaintiff was already in default, because he was only paying half of the principal amount owed to BOA.[5] In December 2012, BOA advised Plaintiff that he was eligible for a loan modification program administered by the Federal Housing Authority (hereinafter "FHA") that would allow modification of his loan, making the repayment terms more affordable for the Plaintiff.[6]

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[1] As set forth below, Plaintiff does, however, agree to withdraw his claims under the Unfair Trade Practices and Consumer Protection Law (hereinafter “Unfair Trade Law”), 73 Pa.C.S. § 201.1 et seq.

[2] A true and correct copies of the note and mortgage are marked and attached hereto as a composite Exhibit “A.” A true and correct copy of the selected pages of the transcript of Plaintiff’s deposition testimony is marked and attached hereto as Exhibit “B” and referenced hereinafter as “McDermott Dep., pp. ____.” See Exhibit “B,” McDermott Dep., pp. 21-22, 27-28. A true and correct copy of the selected pages of the transcript of the deposition testimony of Nationstar’s corporate designee pursuant to F.R.Civ.P. 30(b)(6) – Andrew Loll – is marked and attached hereto as Exhibit “C” and referenced hereinafter as “Nationstar Dep., pp. ____.” See Exhibit “C,” Nationstar Dep., p. 75.

[3] See Exhibit “B,” McDermott Dep., p. 28; Exhibit “C,” Nationstar Dep., p. 75.

In January 2013, Plaintiff and BOA entered into an FHA Trial Period Plan Agreement (hereinafter "TPPA"), whose successful completion was a requirement for a permanent loan modification.[7] The TPPA acknowledged that Plaintiff was "past due" for loan payments "beginning on March 31, 2012 through February 1, 2013" that totaled almost $19,000.00. Pursuant to the terms of the TPPA, Plaintiff agreed that between February 1, 2013 and April 1, 2013, Plaintiff would pay BOA a monthly payment of $1,339.77. In return, BOA agreed that, so long as Plaintiff successfully made each required monthly payment on time, BOA would permanently modify the terms of Plaintiff's mortgage that would: (1) extend the maturity date of the mortgage to January 1, 2043; (2) reduce the interest rate on the mortgage from 4.875% to 3.875%; and (3) reduce the monthly payment to $1,339.77 for the life of the loan. In addition, BOA would modify the principal balance to include the outstanding past due amounts owed by Plaintiff at the time of the modification.[8]

Plaintiff successfully completed his TPPA obligations and, by letter of May 9, 2013, BOA informed Plaintiff that he was "approved for loan modification."[9] This letter included a so-called "summary of the modified mortgage" and a copy of the "Federal Housing Administration (FHA) Loan Modification Agreement" (hereinafter "Loan Modification Agreement") for Plaintiff's signature.[10] Four days later, however, by letter of May 13, 2013, BOA notified Plaintiff that the servicing of his mortgage loan would transfer to Nationstar, effective June 4, 2013.[11] BOA's correspondence explicitly stated that: (1) "[t]he transfer of your loan to Nationstar Mortgage LLC does not affect any terms or conditions of your mortgage loan, other than those terms directly related to the servicing of the loan;" (2) "[y]our monthly payment will not be affected by this transfer;" and (3) "**[i]f you are currently being considered for a loan modification or other foreclosure avoidance program**, your new servicer Nationstar Mortgage LLC is aware of your current account status and will have all of your documents."[12]

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[4] See Exhibit "B," McDermott Dep., pp. 31-33.

[5] See, e.g., id., pp. 31-32; ECF Doc. 1, ¶21. For purposes of this memorandum, all citations of "ECF Doc. __" reference the numbered entries on the electronic docket of this matter. For ease and convenience, in this memorandum, all page citations for documents that appear on the Honorable Court's docket refer to the page numbering determined by the ECF filing system that appears at the top of each page of the filings.

[6] See Exhibit "B," McDermott Dep., pp. 33-34.

[7] A true and correct copy of this document is marked and attached hereto as Exhibit "D."

[8] See id.

Thereafter, Plaintiff received a letter from Nationstar, dated May 30, 2013, wherein Nationstar informed Plaintiff that his loan with BOA would transfer to Nationstar, effective June 4, 2013.[13] That letter stated that for pending loan modifications, Nationstar would "pick up where [BOA] left off and will have all of your documentation."[14] This letter did not contain any mention of the FDCPA and did not include any language required by the FDCPA (such as the amount of the debt, the name of the original creditor (or any creditor), or the validation notice).[15]

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[9] A true and correct copy of this letter (without enclosures) is marked and attached hereto as Exhibit "E." See Exhibit "B," McDermott Dep., pp. 35, 37.

[10] Exhibit "E."

[11] A true and correct copy of this letter is marked and attached hereto as Exhibit "F."

[12] Id. (Emphasis in original).

[13] A true and correct copy of this letter is marked and attached hereto as Exhibit "G." In seeking summary judgment, Nationstar asserts that its initial communication to Plaintiff was a letter dated May 29, 2013. See ECF Doc. 43-1, pp. 18-20. However, as its corporate designee testified, Nationstar's initial communication was a two-page letter attached to Plaintiff's Complaint as Exhibit "D," dated May 30, 2013. See Exhibit "C," Nationstar Dep., pp. 197-98.

[14] Exhibit "G."

On June 4, 2013, Plaintiff signed the Loan Modification Agreement and sent this document to BOA, as he was instructed to do.[16] On June 6, 2013, the Loan Modification Agreement was executed on behalf of BOA and, by letter of June 7, 2013, returned to Plaintiff.[17] This Loan Modification Agreement modified Plaintiff's mortgage in the following fashion: (1) the principal amount of the mortgage increased from $180,748.59 to $192,318.65; (2) Plaintiff's monthly mortgage payment went down to $1,335.73; and (3) the interest rate was lowered to a fixed rate of 3.875% for the life of the loan; and (4) the maturity date of the loan was extended to 2043. In addition, pursuant to the Loan Modification Agreement, interest would begin to accrue at 3.875% on the modified principal balance as of June 1, 2013 and the first new monthly payment was due the same day.[18]

On or about June 18, 2013, Nationstar sent Plaintiff a notice that the servicing of his mortgage had been transferred from BOA to Nationstar as of June 4, 2013.[19] In relevant part, this notice states:

> The servicing of your mortgage loan is being transferred, effective 06/04/13. This means that after this date, a new servicer will be collecting your mortgage loan payments from you. Nothing else about your mortgage loan will change. . . .This is an attempt to collect a debt, and any information obtained will be used for that purpose.[20]

On or about June 18, 2013, Nationstar also sent another notice that the servicing of his mortgage had been transferred from BOA to Nationstar as of June 4, 2013.[21] In that notice, Nationstar incorrectly listed the unpaid principal balance of Plaintiff's mortgage as $180,748.59 and "TOTAL AMOUNT DUE" as $15,993.12.[22] Moreover, this notice included the following language:

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[15] See id.

[16] Exhibit "B," McDermott Dep., pp. 40-41; Exhibit "E."

[17] A true and correct copy of this document is marked and attached hereto as Exhibit "H."

[18] Id.

[19] A true and correct copy of this correspondence is marked and attached hereto as Exhibit " I."

[20] See id.

> Your total debt as of 06/04/13 is $191,643.01. This amount includes your outstanding Unpaid Principal Balance of $180,748.59, $8,254.62 in Interest, $171.78 from Fees, $2,438.02 from Escrow Advances, $30.00 from expenses paid on your behalf and a credit of $0,00 for partial payment amounts.[23]

In addition, the June 18, 2013 notice from Nationstar to Plaintiff contained the following language:

> Based on the information we have received from your previous mortgage servicer, we believe you may be experiencing a financial hardship. We want to help you stay in your home. Nationstar Mortgage may have modification programs and other workout solutions that have not been made available to you. If you would like to discuss some of your options please contact us at (877) 783-7491.
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> **If you are in the process of applying for or providing information related to a workout (including modifications) with BANK OF AMERICA, N.A., we anticipate that your information will soon be transferred to Nationstar Mortgage, but please feel free to contact us to verify we have what we need to move forward.**[24]

The June 18, 2013 notice from Nationstar to Plaintiff also states that, "Nationstar is a debt collector. This is an attempt to collect a debt and any information obtained will be used for that purpose."[25]

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[21] A true and correct copy of this correspondence is marked and attached hereto as Exhibit " J."

[22] See Exhibits "H" and "J."

[23] Exhibit "J."

[24] Id. (Emphasis added).

[25] Id.

Two days later, on June 20, 2013, Nationstar sent Plaintiff a document entitled "ACT 91 NOTICE" which contained the following language:

> **This is an official notice that the mortgage on your home is in default and the lender intends to foreclose. Specific information about the nature of the default is provided in the attached pages.**[26]

The Act 91 Notice stated that Plaintiff's mortgage was in default, because "YOU HAVE NOT MADE MONTHLY MORTGAGE PAYMENTS for the following months and the following amounts are now past due" and contains the following summary:

YOU HAVE NOT MADE MONTHLY MORTGAGE PAYMENTS for the following months and the following amounts are now past due:

Next Payment Due Date:		08/01/2012
Total Monthly Payments Due:		$15,791.34
Late Charges:		$171.78
Other Charges:	Uncollected NSF Fees:	$0.00
	Other Fees:	$0.00
	Corporate Advance Balance:	$30.00
	Unapplied Balance:	($0.00)
TOTAL AMOUNT PAST DUE:		**$15,993.12**

The Act 91 Notice advised Plaintiff that he could "cure the default within THIRTY (30) DAYS of the date of this notice **BY PAYING THE TOTAL AMOUNT PAST DUE TO THE LENDER,** WHICH IS $15,993.12 PLUS ANY MORTGAGE PAYMENTS AND LATE CHARGES WHICH BECOME DUE DURING THE THIRTY (30) DAY PERIOD." The Act 91 Notice also contained the following language:

> **IF YOU DO NOT CURE THE DEFAULT** – If you do not cure the default within THIRTY (30) DAYS of the date of this Notice, **the lender intends to exercise its rights to accelerate the mortgage deb**t. This means that the entire outstanding balance of this debt will be considered due immediately and you may lose the chance to pay the mortgage in monthly installments. If the full payment of the total amount past due is not made with THIRTY

[26] A true and correct copy of this document is marked and attached hereto as Exhibit "K." The letter at issue is a mandatory prerequisite under the Homeowner's Emergency Mortgage Act (hereinafter "Act 91"), 35 P.S. § 1680.401c et seq., for initiating foreclosure of a residential mortgage in the Commonwealth of Pennsylvania. See Exhibit "C," Nationstar Dep., pp. 256-58.

> (30) DAYS, the lender also intends to instruct its attorneys to start legal action to **foreclose upon your mortgaged property.**

The Act 91 Notice advised that, if Plaintiff did not cure the default, the mortgage would be foreclosed upon and Plaintiff's property would be sold at Sheriff's sale. The Act 91 Notice stated that "NATIONSTAR MORTGAGE, LLC IS A DEBT COLLECTOR AND THAT THIS IS AN ATTEMPT TO COLLECT A DEBT."[27]

On June 21, 2013, one day after the date of the Act 91 Notice, Nationstar sent Plaintiff a mortgage loan statement.[28] This statement contained information about Plaintiff's mortgage that directly contradicted the terms of the Loan Modification Agreement.[29] First, the June 21, 2013 statement incorrectly listed the principal balance of Plaintiff's mortgage as $180,748.59, despite the fact that BOA and Plaintiff had contractually agreed to a modified principal balance of $192,318.65. Second, the June 21, 2013 statement listed the interest rate as 4.875% despite the fact that BOA and Plaintiff had contractually agreed to a modified interest rate of 3.875% for the life of the loan. Third, the June 21, 2013 statement listed the monthly payment owed by Plaintiff as $1,431.58, despite the fact that BOA and Plaintiff had contractually agreed to a modified monthly payment of $1,335.73. Finally, the June 21, 2013 statement listed a past due payment of $15,791.34.[30]

More than five weeks after Plaintiff and BOA executed the Loan Modification Agreement, Plaintiff received a letter from Nationstar, dated July 11, 2013, advising him that his mortgage loan payment was past due and that his property may be referred to foreclosure on July 25,

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[27] Exhibit "K."

[28] A true and correct copy of this document is marked and attached hereto as Exhibit "L."

[29] See Exhibits "L" and "H."

[30] See Exhibits "L."

2013.[31] The letter stated that it was a communication from a debt collector and contained the following language:

> Nationstar Mortgage, LLC services the mortgage loan on your property located at the address referenced above. You signed and executed a promissory note secured by a mortgage or deed of trust ("the security instrument") in which you agreed to repay your debt at agreed upon terms. **Because you have not fulfilled the terms of this agreement, Nationstar Mortgage, LLC intends to initiate foreclosure action on the mortgaged property. The foreclosure will be conducted in the name of: Nationstar Mortgage LLC** ("Noteholder").[32]

The July 11, 2013 letter from Nationstar also stated: "We have been unable to contact you **or we have not yet received a complete initial package/borrower response package from you to consider you for a loan modification**."[33] As with the previous correspondence Plaintiff had received from Nationstar, the July 11, 2013 letter contained a description of Plaintiff's account that directly contradicted the terms of Plaintiff's permanent loan modification with BOA.[34]

On July 18, 2013, Nationstar sent Plaintiff another mortgage statement that again incorrectly listed the principal balance of Plaintiff's mortgage as $180,748.59 and the interest rate as 4.875%.[35] In addition, the statement incorrectly claimed that Plaintiff owed a payment of

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[31] A true and correct copy of this document is marked and attached hereto as Exhibit "M." (Emphasis supplied).

[32] Id. (Emphasis supplied).

[33] Id. (Emphasis supplied).

[34] See id. Specifically, the July 11, 2013 letter from Nationstar incorrectly listed the principal balance of Plaintiff's mortgage as $180,748.59, despite the fact that BOA and Plaintiff had contractually agreed to a modified principal balance of $192,318.65. It also incorrectly listed the interest rate in effect as 4.875% despite the fact that Plaintiff and BOA had contractually agreed to an interest rate of 3.75% for the life of the loan. See Exhibit "H."

[35] A true and correct copy of this document is marked and attached hereto as Exhibit "N."

$18,868.28 to Nationstar by August 1, 2013.[36] On August 29, 2013, Plaintiff received another mortgage statement from Nationstar that was dated August 20, 2013.[37] In that statement, Nationstar claimed that Plaintiff was now required to make a payment of $20,299.96 – an amount which included $18,654.50 in "Past Due Payments" – to Nationstar by September 1, 2013.[38] On September 18, 2013, Nationstar sent another mortgage statement to Plaintiff.[39] In that statement, Nationstar falsely claimed that Plaintiff was now required to make a payment of $21,783.97 – an amount which included $20,086.08 in "Past Due Payments" – to Nationstar by October 1, 2013.[40] Ultimately, in November of 2013, Plaintiff received a copy of a letter sent by Nationstar to the Pennsylvania Attorney General's Office, acknowledging its repeated attempts to collect improper amounts from Plaintiff and failure to maintain accurate records.[41]

On December 2, 2013, Plaintiff initiated this matter by filing a Civil Complaint in the instant action against Nationstar. The Complaint contained two causes of action: (1) violation of the FDCPA; and (2) violation of the Unfair Trade Law.[42] On February 27, 2015, Nationstar filed a Motion for Summary Judgment (hereinafter "Motion") with respect to Plaintiff's claims.[43]

III. Argument

In its Motion, Nationstar asserts that summary judgment is warranted as to Plaintiff's FDCPA claims, because: (1) Nationstar is not a "debt collector;" and (2) its letter of May 29,

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[36] Id.

[37] A true and correct copy of this document is marked and attached hereto as Exhibit "O."

[38] Id.

[39] A true and correct copy of this document is marked and attached hereto as Exhibit "P."

[40] Id.

[41] A true and correct copy of this letter is marked and attached hereto as Exhibit "Q."

[42] See ECF Doc. 1.

[43] See generally ECF Doc. 43.

2013 “was not an attempt to collect a debt.”[44] As set forth below, viewed in the applicable light, none of these arguments are a proper basis for granting summary judgment. Defendant’s Motion also seeks summary judgment as to the Unfair Trade Law cause of action, because Plaintiff only asserts a violation of the “catchall provision,” 73 Pa.C.S. § 201-2(4)(xxi).[45] While Plaintiff disagrees with Defendant’s reading of the law, for purposes of streamlining this litigation, Plaintiff withdraws his Unfair Trade Law claim.

A. Standard of Review

The standard for considering requests for summary judgment is well-known and has been summarized by this Honorable Court – specifically with respect to FDCPA litigation – as follows:

> Summary judgment is appropriate if there are no genuine disputes of material fact and the moving party is entitled to judgment as a matter of law. A motion for summary judgment will not be defeated by the mere existence of some disputed facts, but will be denied when there is a genuine issue of material fact. A fact is material if proof of its existence or nonexistence might affect the outcome of the litigation, and a dispute is genuine if the existence is such that a reasonable jury could return a verdict for the nonmoving party.
>
> The Court will view the facts in the light most favorable to the nonmoving party. After taking all reasonable inferences in the nonmoving party’s favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party. While the moving party bears the initial burden of showing the absence of a genuine dispute of material fact, meeting this obligation shifts this burden to the nonmoving party who must set forth specific facts showing that there is a genuine issue for trial.

Strouse v. Enhanced Recovery Co., 956 F.Supp.2d 627, 631-32 (E.D.Pa. 2013)(internal citations and quotations omitted). Based on this standard, Defendant’s Motion should fail.

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[44] ECF Doc. 43-1, pp. 15-20.

[45] ECF Doc. 43-1, pp. 21-24.

B. FDCPA and the "least sophisticated consumer" standard

"The FDCPA is a consumer protection statute that prohibits certain abusive, deceptive, and unfair debt collection practices. The FDCPA's private-enforcement provision . . . authorizes any aggrieved person to recover damages from any debt collector who fails to comply with any provision of the FDCPA." Marx v. General Revenue Corp., ___ U.S. ___, 133 S.Ct. 1166 (2013). Although the FDCPA lists examples of prohibited conduct, such examples are non-exclusive. See, e.g., Diaz, et al. v. D.L. Recovery Corp., et al., 486 F.Supp.2d 474, 477 (E.D.Pa. 2007)(holding that the FDCPA section prohibiting harassment or abuse in connection with collection of a debt merely provided a non-exclusive list of six illustrations).[46] Thus, the FDCPA enables an individual consumer to act as a "private attorney general," righting wrongs that the state and federal government do not have the time, inclination, or money to address. See Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991).

Ultimately, the FDCPA is "a remedial statute, and its language is construed broadly so as to effect its purposes. It is [also] a strict liability statute to the extent it imposes liability without proof of an intentional violation." Benner v. Bank of America, N.A., et al., 917 F.Supp.2d 338, 351 (E.D.Pa. 2013). The FDCPA "is designed to protect consumers who have been victimized by unscrupulous debt collectors, **regardless of whether a valid debt actually exists**." Baker v. G.C. Services Corp., 677 F.2d 775, 777 (9th Cir. 1982)(emphasis supplied). Indeed, for purposes of the FDCPA, the validity of the original debt is irrelevant. See Walter v. Palisades Collection, LLC, 2010 WL 308978 *7 (E.D.Pa. 2010); Clark v. Unifund CCR Partners, 2007 WL 1258113 *2 (W.D.Pa. 2007).

[46] See also Jeter v. Credit Bureau, Inc., 760 F.2d 1168 (11th Cir. 1985); Edwards v. McCormick, 136 F.Supp.2d 795 (S.D. Ohio 2001)(observing that 15 U.S.C. § 1692f serves as a backstop function, catching those unfair practices that managed to slip by 15 U.S.C. § 1692d and 15 U.S.C. § 1692e); Tsenes v. Trans-Continental Credit & Collection Corp., 892 F.Supp. 461 (E.D.N.Y. 1995)(finding that a list of violations in 15 U.S.C. § 1692f is non-exhaustive and a cause of action was provided in the prefatory language).

> From this approach to the FDCPA derives the principle that any lendor-debtor communications potentially giving rise to claims under the FDCPA. . . should be analyzed from the perspective of the least sophisticated debtor. The least-sophisticated-debtor standard is "lower" than a standard based on a "reasonable debtor," as communications that a reasonable debtor would find neither deceptive nor misleading might yet deceive or mislead the reasonable debtor's least-sophisticated counterpart. This standard ensures that the FDCPA protects all consumers, the gullible as well as the shrewd.

Croftcheck v. Accounts Recovery Bureau, Inc., 2012 WL 1378683 *2 (M.D. Pa. 2012); see also Brown, et al. v. Card Service Center, 464 F.3d 450 (3rd Cir. 2006); Wilson v. Quadramed Corp., 225 F.3d 350 (3rd Cir. 2000). Thus, this standard "requires the courts [to] consider the impression that the least sophisticated debtor would receive from the debt collector's communication." Martsolf v. JBC Legal Group, PC, 2008 WL 275719 *3 (M.D.Pa. 2008).

C. Nationstar is a "debt collector" for purposes of FDCPA

Nationstar initially asserts that all of Plaintiff's FDCPA claims fail, "because Nationstar began servicing the [l]oan **after** the June 1, 2013 effective date of the Modification Agreement, Plaintiff's [l]oan was not in default at the time Nationstar began servicing it and it's not a debt collector pursuant to FDCPA."[47] This circuitous argument, however, is without merit. Indeed, Defendant misrepresents the applicable law and attempts to conceal undisputed testimony from its own corporate representative that Nationstar obtained the loan at issue before any modification became effective. As set forth below, the case law is clear – obtaining the debt while it is still in default renders an entity a "debt collector" for purposes of the FDCPA.

The FDCPA applies to "debt collectors" and it has long been recognized that mortgage servicers are subject to FDCPA liability. See 15 U.S.C. § 1692(a)(6). As aptly explained in Portley v. Litton Loan Servicing, 2010 WL 1404610 (E.D.Pa. 2010):

> Under the FDCPA, a "debt collector" is defined as "any person who uses any instrumentality of interstate commerce or the mails

[47] ECF Doc. 43-1, p. 17 (emphasis in original).

> in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." Excluded from the definition of "debt collector," however, are those who collect or attempt to collect a debt "which was not in default at the time it was obtained." Thus, if a mortgage servicer is assigned a debt that is not in default **at the time of the assignment**, the mortgage servicer is not a "debt collector." If, however, the debt is already in default **at the time of the assignment**, the mortgage servicer will be considered a "debt collector" for the purposes of the FDCPA.[48]

The Third Circuit has specifically ruled that "in determining if one is a 'creditor' or a 'debt collector,' courts have focused on the **status of the debt at the time it was acquired**." Check Investors, 502 F.3d at 173 (3rd Cir. 2007).

In the present case, Plaintiff mortgage was in default by November of 2012.[49] In early May of 2013, Plaintiff was approved for a loan modification and, by letter of May 13, 2013, was notified that the servicing of his mortgage loan would transfer to Nationstar.[50] In late May of 2013, Nationstar sent Plaintiff its first written communication.[51] These facts unequivocally establish that Nationstar acquired Plaintiff's loan in May of 2013, as evident from the following testimony of Nationstar's own corporate representative:

> Q: And how is that Nationstar became involved in the loan?
>
> A: Nationstar became involved on a servicing transfer of this

[48] 2010 WL 1404610 *3 (internal citations omitted)(emphasis supplied); see also Owens v. JP Morgan Chase Bank, 2013 WL 2033149 *3 (W.D.Pa. 2013)(noting that "[a] creditor's assignee is . . . not a debt collector [for purposes of the FDCPA] as long as the obligation was not in default **at the time of the assignment**. . . .")(internal quotations omitted)(emphasis supplied).

[49] ECF Doc. 1, p. 4, ¶¶20-1.

[50] See Exhibits "E" and "F."

[51] ECF Doc. 43-1, pp. 18-20. As related earlier, despite Defendant's own corporate designee acknowledging that Nationstar's initial letter to Plaintiff was dated May 30, 2013, in its Motion, Nationstar argues that its initial communication with Plaintiff was a letter dated May 29, 2013. See Exhibit "C," Nationstar Dep., pp. 197-98; ECF Doc. 43-1, pp. 18-20. Regardless of this dispute, there is no doubt that Nationstar's initial correspondence to Plaintiff was sent in (and dated by) May of 2013.

particular loan in the pool of loans on – the transfer itself, **the contractual transfer I believe happened somewhere – sometime in May of 2013**. . . .

* * *

Q: You said the transfer occurred in May of 2013?

A: Yes. Because I – I remember their trial period being February, March and April of 2013 when [BOA] had sent them the approval on their trial plan. . .We boarded it in June in our system, but **contractually I think the exchange of transfer happened in May** because I reviewed the original letter from Nationstar, and I think I also reviewed before today, the goodbye letter from [BOA].

Q: Okay. Let me ask you. When you say you boarded the loan in June of 2013, what do you mean "boarded"?

A: Boarded the loan means the loan was on our system where our employees could view – servicing employees could actually view the account. Boarding is usually – we see it a few weeks or a few days prior to a welcome letter going out. . .

* * *

Q: Have you ever had – aware of any instance where Nationstar sent out a letter to a borrower that says we're going to be your servicing agent or provider for your loan prior to them acquiring the servicing rights?

A: Not in my area of service for the company. It's always been post of the execution of the contract.[52]

As further clarified by Mr. Loll later in his testimony, "at the time when [BOA] transferred this [loan], they had not booked Mr. McDermott's modification yet."[53] Hence, even accepting Nationstar's argument that the loan modification cured any defaults in Plaintiff's mortgage as of June 1, 2013, it is undisputed that Nationstar acquired the loan before that date, when Plaintiff's

[52] Exhibit "C," Nationstar Dep., pp. 75-77, 83 (emphasis supplied).

[53] Id., p. 193; see also pp. pp. 197-98 (stating that Nationstar's letter of May 30, 2013 was "an initial communication from Nationstar **shortly after** an agreement was executed by Nationstar and Bank of America on servicing rights transfer. . . .").

loan was still in default (as inexplicably acknowledged by Nationstar's Motion).[54] Therefore, in accordance with the applicable precedent, Nationstar is a "debt collector" under the FDCPA. See Check Investors, supra; Pollice v. National Tax Funding, LP, 225 F.3d 379, 403-4 (3rd Cir. 2000)(holding that one attempting to collect a debt is a "debt collector" under the FDCPA, if the debt in question was in default when acquired, and, conversely, that Section 1692a dictates that an entity is a "creditor," if the debt it is attempting to collect was not in default when it was acquired).[55]

For this reason, Nationstar's assertion that "Plaintiff's claims are wholly premised upon the contention that his [l]oan was no longer in default **at the time servicing transferred** to Nationstar" is entirely baseless.[56] Indeed, as demonstrated above, in determining who is "debt collector" under FDCPA, the time when "servicing transferred" is irrelevant; rather, "Congress has unambiguously directed **our focus to the time the debt was acquired**."[57] For this reason, contrary to Nationstar's argument, Plaintiff's FDCPA claims are based on the undisputed facts that: (1) when Nationstar acquired Plaintiff's mortgage in May of 2013 it was in default; (2) Nationstar later failed to acknowledge that, after Nationstar acquired Plaintiff's mortgage, his default was cured; and (3) although Plaintiff was no longer in default, Nationstar then targeted Plaintiff for collection of amounts that could only have been due in light of the default that no

[54] See ECF Doc. 43-1, p. 17 (asserting that "Plaintiff executed the [Loan] Modification Agreement on June 4, 2013 and, under the explicit terms of the Modification Agreement, **Plaintiff's [l]oan was no longer in default as of June 1, 2013** – the effective date of the [Loan] Modification Agreement. . . .")(emphasis supplied).

[55] The present case is easily distinguishable from Oppong v. First Union Mortgage Corporation, et al., 2003 WL 23162436 (E.D.Pa. 2003), where the Honorable Court found that an original creditor that continued to service the mortgage after its transfer was not a "debt collector" for purposes of the FDCPA. In the present case, Nationstar had nothing to do with Plaintiff's mortgage prior to acquiring it from BOA – in May of 2013 – when it was still in default. See Exhibit "C," Nationstar Dep., pp. 81-82.

[56] ECF Doc. 43-1, p. 16.

[57] Check Investors, 502 F.3d at 173.

longer existed. Accordingly, Nationstar's effort to seek summary judgment in this regard is entirely devoid of merit.[58]

D. Nationstar violated Section 1692g(a) of the FDCPA

Defendant also seeks summary judgment as to Plaintiff's claim that it violated Section 1692g(a) of the FDCPA. In relevant part, Section 1692g(a) of the FDCPA states:

> Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing –
>
> (1) the amount of the debt;
>
> (2) the name of the creditor to whom the debt is owed;
>
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
>
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
>
> (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.[59]

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[58] See 15 U.S.C. § 1692a(5)(defining the term "debt" for purposes of FDCPA to mean "any obligation or **alleged obligation** of a consumer to pay money. . .")(emphasis supplied); see also Schlosser v. Fairbanks Capital Corp., 323 F.3d 534 (7th Cir. 2003)(finding that a mortgage servicer's mistaken allegation of default on a current mortgage debt brought the servicer within the FDCPA's coverage); Bailey v. Security National Servicing Corp., 154 F.3d 384 (7th Cir. 1998)(holding that mortgage servicers could not be "debt collectors" with respect to a letter concerning payments due under a renegotiated forbearance agreement and pointing out that "we distinguish between an individual who comes collecting on a defaulted debt and one who seeks collection on a debt owed under a brand new payment plan, or forbearance agreement that is current. . . .").

[59] 15 U.S.C. § 1692g(a).

Nationstar does not dispute that: (1) its first communication with Plaintiff did not include the information mandated by Section 1692g(a); and (2) this information also was not sent to Plaintiff within five (5) days of Nationstar's first communication with Plaintiff. Instead, Nationstar challenges Plaintiff's FDCPA claim premised on 15 U.S.C. § 1692g(a), because its "initial communication" – that Nationstar maintains, without factual support, is a letter of May 29, 2013 – "is not a debt collection communication."[60] As set forth below, Defendant is plainly wrong as to both: (1) what letter was the initial communication; and (2) whether its initial communication was "in connection with the collection of any debt."

To be liable under the FDCPA, "a debt collector's targeted conduct must have been taken in connection with the collection of a debt or in order to collect any debt." Simon v. FIA Card Services, N.A., 732 F.3d 259, 265 (3rd Cir. 2013)(internal quotations omitted). Thus, for purposes of FDCPA, "[a] communication is the conveying of information regarding a debt and is not limited to specific requests for payment." Allen ex rel. Martin v. LaSalle Bank, N.A., 629 F.3d 364, 368 n.5 (3rd Cir. 2011). Just last year, the Third Circuit addressed this issue in a case where a law firm argued that its correspondence regarding a defaulted mortgage "did not constitute debt collection activity" subject to FDCPA, because it "made no demand for payment, contained no suggestion that [plaintiff] settle the underlying debt, nor enter into a payment plan." McLaughlin v. Phelan Hallinan & Schmieg, LLP, 756 F.3d 240, 245 (3rd Cir. 2014). In summarily rejecting this claim, the unanimous panel found that the letter plainly constituted a "part of a dialogue" intended to "facilitate satisfaction of the debt." Id., at 245-6. The opinion further elaborated that FDCPA's "substantive provisions make clear that it covers conduct taken **in connection with the collection of any debt**. Put differently, **activity undertaken for the general purpose of inducing payment** constitutes debt collection activity." Id., at 245 (internal

[60] ECF Doc. 43-1, p. 20. A true and correct copy of this correspondence is marked and attached hereto as Exhibit "R."

citations omitted)(emphasis supplied).

As an initial matter, the one-page letter dated May 29, 2013 is not the first communication between Nationstar and Plaintiff. In fact, during his deposition, Plaintiff did not affirmatively acknowledge ever seeing this letter.[61] Indeed, Plaintiff could not have seen the letter of May 29, 2013, because what he was shown is not even the original or a copy thereof, but – as explicitly stated in its overlapping header and footer – a "REPRESENTATION OF PRINTED DOCUMENT" and "INTERNET REPRINT."[62]

Moreover, as stated in the Complaint that was filed more than a year ago, the first communication from Nationstar to Plaintiff was a two-page letter, dated May 30, 2013 that was attached thereto as Exhibit "D."[63] This was acknowledged by Nationstar's corporate designee, Andrew Loll, during his deposition:

> Q: [L]ooking at the top, if you turn to Page 25 of 65, Exhibit D, then the next page is **a letter dated May 30, 2013**.
>
> A: Yes.
>
> Q: Do you see that?
>
> A: I do.
>
> Q: Okay. What is Exhibit D to the complaint, which – it looks like a two-page document.
>
> A: **It's an initial communication from Nationstar shortly after an agreement was executed by Nationstar and**

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[61] See Exhibit "B," McDermott Dep., p. 49.

[62] Exhibit "R."

[63] See ECF Doc. 1-5, pp. 2-3; ECF Doc. 1, ¶¶32-33. Later, this document was turned over to Nationstar in Plaintiff's document production, bate-stamped "MMvNM0082-83." See Exhibit "G." It should be noted that, at the preliminary stage of this litigation, Nationstar sought dismissal on the basis of the same argument made in this Motion (i.e., that Nationstar's initial communication with Plaintiff did not trigger Section 1692g(a) requirements). At that time, however, Nationstar's argument was premised on the letter of May 30, 2013. See ECF Doc. 9-3, pp. 16-18. Importantly, Nationstar did not contest that the letter of May 30, 2013 was its first communication to Plaintiff and made no mention of any correspondence dated earlier. See id.

> **Bank of America on servicing rights transfer** notifying Mr. McDermott who we are, and he should be receiving a letter in the future. The purpose is for certain information relating to the pending transfer of your loan. We encourage you to visit the mynationstar.com welcome area, and it just basically go – it's self-explanatory. The loan terms will not change. Your pending loan modification[,] insurance will pick up where they left off and we will have all of your documentation.
>
> Q: All right. This letter, it's dated May 30, 2013. Do you see that?
>
> A: Yes, sir.
>
> Q: Okay. So this letter was sent to Mr. McDermott prior to his file being uploaded to Nationstar system; is that correct?
>
> A: That's correct. The imaging file has not been uploaded yet.[64]

Earlier, in its Answer to Plaintiff's Complaint, Nationstar also admitted sending Plaintiff the two-page letter of May 30, 2013 and did not mention any prior correspondence.[65]

Although there is no substantive difference between their front pages (other than the date), the second (reverse) side of the letter of May 30, 2013 – that Nationstar has not produced with respect to its letter of May 29, 2013 – materially alters the plain reading of this communication. Indeed, the two pages of the May 30, 2013 letter make it abundantly clear that Plaintiff was expected to make his mortgage payments to Nationstar, where they should be sent, as well as how they will be processed and applied. The reverse side of the letter – which is identical to what appeared on Nationstar's subsequent billing statements and default notices[66] – also details the nefarious consequences of non-payment (i.e., late charges and adverse reporting to credit bureaus).[67] In short, read in its entirety, the initial communication is "conveying . . . information regarding the debt." See Allen, 629 F.3d at 368 n.5. Therefore, it is certainly a part of Defendant's collection efforts pursuant to applicable Third Circuit case law.

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[64] Exhibit "C," Nationstar Dep., pp. 197-98 (emphasis supplied). Notably, Nationstar does not cite to this testimony and has failed to even acknowledge the existence of the letter of May 30, 2013 in its Motion. See generally ECF Doc. 43-1.

[65] See ECF Doc. 1, ¶¶32-33; ECF Doc. 26, ¶32 (admitting that Nationstar "sent a letter to an address associated with Plaintiff on or about May 30, 2013"); ECF Doc. 26, ¶33 (admitting that "the May 30, 2013 notice to which Plaintiff refers was explicitly for the purpose of informing Plaintiff that servicing of his mortgage loan would be transferring from BOA to Nationstar. . ."). Notably, when undersigned counsel raised the discrepancy at issue with Nationstar's counsel, by e-mail of March 10, 2015, Nationstar's counsel advised that "Nationstar **has no record** of sending the May 30, 2013 letter." A true and correct copy of the e-mail exchange at issue is marked and attached hereto as Exhibit "S." (Emphasis supplied).

Indeed, the letter Plaintiff was actually sent contains the exact language whose absence Nationstar now asserts excludes it from being an "initial communication." The letter of May 30, 2013 also makes repeated references to and encourages recipients to visit Nationstar's website – www.MyNationstarMtg.com – which contains numerous "foreclosure alternative" options, if the debtor does not have sufficient funds available (e.g., modifications, refinancing, forbearance agreements, and deeds-in-lieu of foreclosure).[68] For instance, the following text is prominently featured to induce partial payments for mortgages serviced by Nationstar:

> Repayment Plans
>
> For customers experiencing a temporary hardship, Nationstar offers repayment plans to help you get back on track. If you qualify, you can pay an amount larger than your contractual monthly payment over a period of time (usually no longer than 6 months) until your loan is current.
>
> To learn more about our Repayment Plans, call 1-888-480-2432. Please be prepared to discuss your monthly income and expenses in detail with a Nationstar representative who will assist in finding the payment that's right for you.

https://www.nationstarmtg.com/CustomerCenter/MakingHomeAffordablePlan_OtherStates.aspx

Notably, as explained by Nationstar's corporate representative, the letter of May 30, 2013 is a part of a single "welcome letter package," which actually contains additional documents sent to Plaintiff – "a servicing transfer letter, and a confirmation of debt or debt disclosure to the borrower."[69] Collectively, this "welcome letter package" advises that Nationstar "is a debt collector," as well as that the communication "is an attempt to collect a debt and any information obtained will be used for that purpose."[70] It also provides the borrower with the principal balance of the loan, directs where payments are to be made, and contains the following, highlighted statement concerning modifications:

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[66] Compare Exhibits "G," "N," "O," and "P."

[67] See Exhibit "G."

[68] See, e.g., https://www.nationstarmtg.com/PaymentAssistance/NewStart.aspx; https://www.nationstarmtg.com/PaymentAssistance/. As explained by Nationstar's corporate representative, "the purpose [of the May 30, 2013 letter] is for certain information relating to the pending transfer of [the] loan. **We encourage you to visit the mynationstar.com** welcome area." Exhibit "C," Nationstar Dep., pp. 197-98 (emphasis supplied).

> **Account Status**
>
> **Based on the information we have received from your previous mortgage servicer, we believe you may be experiencing a financial hardship. We want to help you stay in your home. Nationstar Mortgage may have modification programs and other workout solutions that have not been made available to you. If you would like to discuss some of your options please contact us at (877) 783-7491.**

Given this testimony and the contents of the entire "welcome letter package," it is simply inconceivable how Nationstar can now artificially "pluck out" its letter of May 30, 2013 and assert that it is not "conveying . . . information regarding a debt." Allen, 629 F.3d at 368 n.5.

To the contrary, under the circumstances, there is little doubt that the "least sophisticated consumer" would interpret the correspondence of May 30, 2013, as an attempt to collect a debt; especially, where (1) this consumer has no other relationship with Nationstar; (2) the letter at issue was only sent, because Plaintiff had a mortgage that was now going to be serviced by Nationstar; (3) the letter at issue is part of Nationstar's package of documents that unequivocally is sent "in connection with the collection of any debt;" and (4) Nationstar had no other reason to contact him.[71] Clearly, the letter at issue is an "activity undertaken for the general purpose of inducing payment" and, therefore, constitutes an "initial communication" for purposes of Section 1692g(a) of the FDCPA.[72]

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[69] Exhibit "C," Nationstar Dep., pp. 199-200 (emphasis supplied). See Exhibits "I" and "J."

[70] Exhibits "G," "I," and "J."

[71] Exhibit "C," Nationstar Dep., pp. 75-6 (emphasis supplied).

[72] See Gburek v. Litton Loan Serv., LP, 614 F.3d 380, 386 (7th Cir. 2010)(emphasizing the relationship of the parties and the intent of the communication); Romea v. Heiberger & Assocs.,

(Footnote continued on the next page)

Moreover, insofar as there is a factual dispute between the parties as to which letter represents the "initial correspondence" (May 29 or May 30, 2013), it is clear that Nationstar's request for summary judgment must be denied. Indeed, Defendant has acknowledged sending the May 30, 2013 letter and there is nothing to demonstrate that the May 29, 2013 letter was actually sent to Plaintiff.[73] Rather, as Exhibit "R" makes clear, it was simply a "REPRESENTATION OF PRINTED DOCUMENT" and "INTERNET REPRINT."[74] Plainly, summary judgment is unwarranted where Plaintiff asserts, Defendant has admitted, and its corporate designee confirmed that the initial correspondence was a different letter from May 30, 2013.

Further, Nationstar's argument that "welcome letters . . . do not trigger the requirements of Section 1692g(a) as they do not constitute debt collection communications" is false. In fact, Nationstar noticeably fails to cite McLaughlin – the latest Third Circuit opinion on this issue – or any post-McLaughlin decision within the Third Circuit. For instance, Nationstar's current counsel did not succeed in making the same argument that Nationstar is making now in Grubb v. Green Tree Servicing, LLC, 2014 WL 3696126 (D.N.J. 2014), where the trial court found that a servicer's "welcome letter" is an "initial communication" for purposes of FDCPA. Notably, the court in Grubb explicitly distinguished Thompson v. BAC Home Loans Servicing, LP, 2010 WL 1286746 (N.D.Ind. 2010) – a decision being cited by Nationstar in its Motion – where the court found that a "notice of transfer" that did not "demand any payment" was not sent in connection with the collection of a debt. In doing so, Grubb pointed out that, in light of McLaughlin, "the Third Circuit has adopted a broader reading of the phrase 'in connection with,' and has rejected

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163 F.3d 111, 117 (2nd Cir. 1998)(holding that a notice sent in connection with eviction proceedings was a communication related to debt collection, because the notice aimed "at least in part to induce [the debtor] to pay the back rent she allegedly owed. . . .").

[73] See ECF Doc. 1, ¶¶32-33; ECF Doc. 26, ¶¶32-33; Exhibit "C," Nationstar Dep., pp. 197-98.

[74] Exhibit "R."

the proposition that the FDCPA applies only to communications that make explicit demands for payment." Grubb, 2014 WL 3696126 *6.

The present situation is also factually distinguishable from Oppong v. First Union Mort. Corp., 566 F.Supp.2d 395 (E.D.Pa. 2008), where a consumer asserted that Wells Fargo violated the FDCPA by attempting to collect a debt without first serving a validation notice, which was not contained in its "notice of transfer" letter. The district court rejected this argument, because it was "uncontested that Wells Fargo did not undertake any debt collection action." It also found that Well Fargo's letter was not an "initial communication" for purposes of Section 1692g(a), because the consumer was already served with a formal foreclosure complaint, which contained the requisite language, and Wells Fargo was not obligated to provide a second validation notice. See Oppong, 566 F.Supp.2d at 403-04.

Unlike Oppong, Nationstar undertook significant "debt collection action" with respect to the underlying mortgage. For example, Nationstar sent Plaintiff an Act 91 Notice (threatening foreclosure), attempted to engage Plaintiff in modifying his loan, and forwarded numerous letters, seeking payment of erroneous, prohibitively exorbitant amounts.[75] Moreover, Nationstar's correspondence was the first communication received by Plaintiff from Nationstar – Nationwide made no prior attempt to contact Plaintiff.

The present case is equally distinguishable from Gregory v. Nationstar Mortgage, LLC, 2014 WL 1875167 (D.N.J. 2014), another opinion cited by Nationstar that was decided before McLaughlin, where the district court dismissed an FDCPA claim at the preliminary stages, finding that a letter from a new servicer that did not even mention the effective date of the transfer and whose "purpose was not to induce payment," did not trigger Section 1692g requirements. Clearly, in addition to the district court not being guided by McLaughlin, the letter in Gregory was different from Nationstar's correspondence in the present case. First,

[75] See Exhibits "J," "K," "N," "O," and "P."

Nationstar's letter includes the date of the transfer. Second, it directs Plaintiff to send payments to Nationstar and explains their processing and application. Third, as pointed out earlier, Nationstar's letter details the consequences of non-payment (i.e., late charges and adverse reporting to credit bureaus). Finally, as acknowledged by Nationstar, its initial letter is part of a package of multiple documents that – without a shadow of a doubt – concern collection of Plaintiff's mortgage.

Simply stated, Defendant's arguments lack any basis in the law or the facts gleaned to date. Accordingly, its Motion should be denied insofar as it seeks summary judgment as to Plaintiff's well-substantiated FDCPA claims.

E. Unfair Trade Law

Although Plaintiff disagrees with Nationstar's interpretation of the Unfair Trade Law, Plaintiff agrees to voluntarily withdraw his claims under this statute.

IV. Conclusion

Wherefore, for all of the above-reasons, Plaintiff respectfully requests that this Honorable Court deny Defendant's Motion.

(SIGNATURE ON THE NEXT PAGE)

Date: March 30, 2015

Respectfully submitted,

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